(7)

No. 87-1318

In The

Supreme Court of the United States

October Term, 1987

VOLT INFORMATION SCIENCES, INC.,

Appellant,

vs.

THE BOARD OF TRUSTEES OF THE LELAND STANFORD JUNIOR UNIVERSITY, a body having corporate powers,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SIXTH APPELLATE DISTRICT

APPELLEE'S BRIEF ON THE MERITS

McCutchen, Doyle, Brown & Enersen
David M. Heilbron
(Counsel of Record)
Leslie G. Landau
Stephen L. Godchaux

Three Embarcadero Center
San Francisco, CA 94111
Telephone: (415) 393-2000
Counsel for Appellee The Board of Trustees of the Leland Stanford Junior University

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Two private parties agreed that their private construction contract was to be governed by the law of the place where the construction project was located. The contract contained an arbitration clause. The project was located in Santa Clara County, California, so a state court found that the parties meant their contract to be governed by the law of that place, California, and to arbitrate under the rules set forth in California law. The Court enforced the parties' agreement to arbitrate under the rules set forth in California law, in accordance with the agreement's terms.

1. Does the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, force parties who agree to arbitrate in accordance with state rules to arbitrate instead in accordance with federal rules?

Does that present a substantial federal question?

2. Does the private parties' private agreement mean what the state court found it to mean?

Does that contract interpretation question present a federal question and, if it does, is it substantial?

LIST OF RELATED COMPANIES REQUIRED BY UNITED STATES SUPREME COURT RULE 28.1

Pursuant to Supreme Court Rule 28.1, Appellee The Board of Trustees of The Leland Stanford Junior University lists the following non-wholly owned subsidiary and affiliate:

Stanford University Hospital

TABLE OF CONTENTS

TABLE OF CONTENTS–Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

I. JURISDICTION

Appellant asserts that 28 U.S.C. § 1257(2) provides "the statutory basis of the Court's jurisdiction" on this appeal (O. Br. 1),[1] but it does not. This case presents two questions. The first is federal but not substantial, the other is not federal or substantial, and neither presents a § 1257(2) question for review. We address those questions here, because the Court postponed further consideration of jurisdiction to the hearing on the merits. (Supreme Court Rule 16.8)

A. First Question

The California Court of Appeal, "the highest court of the State in which a decision could be had" (O. Br. 4), found that Volt and Stanford had agreed to arbitrate in accordance with the rules set forth in California law. (Dec. J.A. 65) The trial court applied the rule set forth in California Code of Civil Procedure ("CCP") § 1281.2(c) to the parties' agreement to arbitrate,[2] and so enforced the agreement in accordance with its terms. The Court of Appeal affirmed. (Dec. J.A. 78-80)

The parties' contract was in interstate commerce. Therefore, the rules set forth in the Federal Arbitration

---

[1] We refer to Appellant's Opening Brief as "O. Br. ___," the Joint Appendix as "J.A. ___," the California Court of Appeal's decision in this case as "Dec. J.A. ___," Appellant Volt Information Sciences, Inc. as "Volt" and The Board of Trustees of The Leland Stanford Junior University as "Stanford."

[2] Section 1281.2(c) permits a court to stay an arbitration to avoid piecemeal, duplicative litigation and the danger of conflicting judgments with respect to the same set of facts. *See* p. 20, below.

Act, 9 U.S.C. § 1, *et seq.* ("FAA"),[3] would have applied to their agreement (O. Br. 63-64) had the parties not agreed that California rules would apply to it. The Court of Appeal having enforced the parties' agreement to arbitrate in accordance with California rules, this question is put: Does the FAA force parties who agree to arbitrate in accordance with state rules to arbitrate instead in accordance with federal rules?

That question is federal, but insubstantial; the answer is no. Arbitration is a matter of agreement. Parties can agree to arbitrate in any way they want; thus they can agree to arbitrate some disputes, and not all, in some circumstances, and not all, or not at all. A court cannot force parties to arbitrate a dispute they have not agreed to arbitrate or in a way they have not agreed to arbitrate. Those are basic principles of arbitration law, and the FAA does not change them.

The FAA is meant to put arbitration agreements "upon the same footing as other contracts." H.R. Rep. No. 96, 68th Cong. lst Sess. 1 (1924); *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984). It prohibits a state or federal

---

[3] Actually, §§ 1 and 2 of the FAA would apply, but §§ 3 and 4, the procedural provisions of the FAA, would not apply in state court proceedings, whether or not the parties had agreed to be bound by state court rules. CCP § 1281.2(c) does not conflict with §§ 1 and 2 of the FAA, whether or not it does with §§ 3 and 4; accordingly, the FAA would not have prevented the state court's application of CCP § 1281.2(c) in state court proceedings, whether or not the parties had agreed to arbitrate in accordance with state court rules. The Court, however, need not reach this question. *See* Argument, Part IV C, below.

court from refusing to enforce an arbitration agreement subject to the FAA in accordance with the agreement's terms. *See, e.g., Southland Corp.*, above, 465 U.S. at 16 n.11 (state cannot refuse to arbitrate Franchise Act claims where parties agreed to arbitrate them). The FAA does not mandate any court to disregard the parties' agreement, much less compel parties to arbitrate a dispute they have not agreed to arbitrate or in a way they have not agreed to arbitrate. To the contrary. The FAA mandates that courts enforce arbitration agreements in accordance with their terms, no more, no less. *See* Argument, Part IV A, below; *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (emphasis added):

> *"The legislative history of the Act establishes that the purpose behind the passage was to ensure judicial enforcement of privately made agreements to arbitrate.* We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims. *The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement – upon the motion of one of the parties – of privately negotiated arbitration agreements."*

That is settled law; there is no authority the other way. *See* Argument, Part IV A, below. The Court of Appeal's decision followed that settled law. It held that the parties were free "to choose the terms under which they will arbitrate"; that that choice "will not run afoul of the FAA;" and that it would turn those basic principles of arbitration law and the FAA upside down were the Court to force the parties to arbitrate under federal, not state, rules when they had agreed to arbitrate under state, not federal, rules. (Dec. J.A. 71-73) Therefore, it enforced the parties' agreement.

Accordingly, the federal question this case puts is settled, not substantial. Certainly it presents no "special

and important reasons" for review by certiorari under 28 U.S.C. § 1257(3) and Supreme Court Rule 17. It presents no ground for appeal under 28 U.S.C. § 1257(2). Section 1257(2) provides for appeal "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The Court of Appeal's decision does not uphold the validity of § 1281.2(c) as not repugnant to the laws or Constitution of the United States; the decision assumed the laws of the United States would apply but for the parties' agreement. (Dec. J.A. 65; O. Br. 62-63) The Court of Appeal's decision simply upholds the validity of the parties' agreement as not repugnant to the laws or Constitution of the United States. (Dec. J.A. 71-73)

That decision is in accord with settled federal law, presents no substantial federal question (pp. 2-3, above, 25-30, below), and since it validates an agreement, not a state statute, is not subject to review by appeal under § 1257(2). *See Local 926, Int'l Union of Operating Engineers v. Jones*, 460 U.S. 669, 675 n.7 (1983) (decision upholding validity of state common law tort action not appealable under § 1257(2), since state common law is not a "state statute"); *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 42 (1983) (decision as to invalidity of sections of collective bargaining agreement not appealable under 28 U.S.C. § 1254(2), the reciprocal of § 1257(2), because an agreement is not a statute, and the statute under which agreement made was not found invalid); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 247 (1984) (decision as to invalidity of punitive damages award rendered under statute not appealable under § 1254(2), because an award is not a statute, and statute was not

found invalid). Contrast *Southland Corp.*, above, 465 U.S. at 6-8 (decision upholding validity of Cal. Corp. Code § 31512g, a statute, appealable under § 1257(2)); *Perry v. Thomas*, ___ U.S. ___, 107 S. Ct. 2520, 2525 n.7 (1987) (decision upholding validity of Cal. Lab. Code § 229, a statute, appealable under 1257(2)).[4]

Volt has nothing to say about any of this.[5]

B. Second Question

The Court of Appeal construed the clause "law of the place where the project is located" to mean the law of California, where the project was located. It had "no doubt" that that is what the parties "intended" the "word 'place' " to "mean." (Dec. J.A. 66)[6]

Volt objects to that "interpretation" (O. Br. 37, 38) of the parties' choice-of-law clause and argues that there was no "extrinsic evidence" to support it. (O. Br. 48, 75) The clause really means, Volt goes on, California-law-

---

[4] *Silkwood* also notes the relevance of § 1257 and § 1254 cases to one another, because of the "history of . . . close relationship between" them. 464 U.S. at 247 n.9 (citation omitted)

[5] Indeed, Volt's jurisdictional argument proves the point. Almost all of it is directed to the contract interpretation (state law) question. (O. Br. 25-54, 55-58) As to this (federal) question, Volt says that if the arbitration "clause" means what the Court interpreted it to mean, the "clause" (not § 1287.2(c)) would violate "federal policy." (O. Br. 54-55)

[6] Volt paraphrases the Court's determination, incorrectly, this way:

> " '[w]e have no doubt' that the particular terms of this clause were meant to exclude federal law from any application to this controversy (J.A. 66)." (O. Br. 38)

plus-the-law-of-all-the-"political-entities"-whose-laws-"are-applicable-in-one-way-or-another"-in-California, specifically including federal law. (O. Br. 75) That is Volt's "principal contention" on this "appeal." Therefore, the second, and according to Volt, principal question is whether the Court's or Volt's interpretation of the parties' choice-of-law clause is right.

That is not a federal question. Volt admits "that the general subjects of choice-of-law and contract interpretation are ordinarily regarded as the exclusive concern of the state courts and legislatures . . . " (O. Br. 26), and that is certainly so. *Klaxon v. Stentor Mfg. Co.*, 313 U.S. 487, 496 (1941) (federal court in diversity case must apply state conflicts rules); *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) (same; "federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits"). *Erie R. Co. v. Tompkins*, 304 U.S. 64, 71, 75, 78 (1938) (holding that "there is no federal general common law," and overruling *Swift v. Tyson*, 41 U.S. 1, 18 (1842); *Swift* had held that federal general common law existed and applied, among other things, "to the construction of ordinary contracts" and "the true exposition of the contract . . . "); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) (state law determines whether clause in private contract is severable).

Volt tries to metamorphose this state choice-of-law/contract-interpretation question into a federal question, and starts with names.

1. Volt's Argument About Names.

Volt says, first, that the rule that state choice-of-law rules govern private contracts only applies to " 'horizontal' choices between the laws of two different states," not to a " 'vertical' choice between state and federal law," because no one calls a vertical conflict a " 'choice of law' problem." (O. Br. 27)

Volt admits that "no direct citation can be provided for this conclusion" (O. Br. 28), and it is wrong. The rule that state choice-of-law rules govern private contracts does not depend on the angle of relationship between laws, or geometry. For example, state law governs choices as to private contracts between the laws of states and foreign sovereigns, whose relationships are hardly horizontal. Restatement (2d) of Conflict of Laws, § 10, Reporter's Note. *See, e.g., Ramirez v. Wilshire Ins. Co.*, 13 Cal. App. 3d. 622 (1970) (conflict between California and Mexican law); *Giesler v. Berman*, 6 Cal. App. 3d. 919 (1970) (conflict between California and Swiss law). Moreover, if names matter, courts and commentators in fact call choices between state and federal law choice-of-law problems. *See, e.g., Perry v. Thomas*, 107 S. Ct. at 2527 n.9 (referring to "choice-of-law issue" as between "federal and state law principles"); Hart, *The Relations Between State And Federal Law*, 54 Colum. L. Rev. 489, 506 (1954); Mishkin, *The Variousness Of Federal Law: Competence And Discretion In The Choice Of National And State Rules For Decision*, 105 U. Pa. L. Rev. 797, 802-3 (1957).

But, Volt goes on, the issue as to whether state or federal law applies here is not one of " 'choice of law' at all, but is instead a straightforward issue of federal supremacy. . . ." "Any other conclusion," Volt warns, would "consign the entire issue of Supremacy Clause

adjudication to the courts of the fifty states. . . ." (O. Br. 28) That hyperbole reflects Volt's fundamental error. Federal law is no doubt supreme, and whether a federal law preempts a conflicting state law is no doubt a federal question. That is not this question.

Here private parties chose to be governed by the law of the place where their project was located. The question is what the parties meant. The answer turns on intent, not the Constitution; the Supremacy Clause does not tell private parties what they intend, and what they intend does not affect the Supremacy Clause.[7]

State law determines the interpretation of clauses in private parties' contracts; what one names the clause does not matter. Therefore state law determines what these parties' choice-of-law clause means, whether or not Volt's contention is right that the clause ought not be called a choice-of-law clause. Volt grants that to be the rule "ordinarily." (O. Br. 29) That ordinary rule governs.

2. Volt's Argument That The Ordinary Rule Does Not Apply.

Volt says the ordinary rule does not apply for two reasons. First, Volt notes that the interpretation of a "waiver or release of rights conferred by a federal statute" is governed by federal law. That is true. Volt says the parties' agreement to be governed by California law is the same as a release of the right to arbitrate under federal law. (O. Br. 30-36) That is false. A release gives up

---

[7] The Supremacy Clause makes federal law supreme, "anything in the *Constitution* or *Laws* of any State to the contrary notwithstanding." Constitution, Article VI (emphasis added) It says nothing about private intent.

claims that have arisen under a place's law.[8] An agreement to be governed by a place's law gives up no claim; it chooses the law under which claims are to be resolved when they arise. Moreover, it makes sense for the law of the place that creates a right to determine its release. *See Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. at 361-63 (state law ought not control what "defeats" a federal claim). It makes no sense for the law of the place parties did not choose to determine their rights under the law of the place they did choose.[9]

Second, Volt objects that the Court of Appeal "invoked no general rule of contract interpretation or

---

[8] *See* Volt's Supreme Court cases, O. Br. 31-32: *Zenith Radio Corp. v. Hazeltine Research Co.*, 401 U.S. 321, 343-44 (1971) (effect of release of federal antitrust claim); *Aro Mfg. Co. v. Convertible Top Co.*, 377 U.S. 476, 500-01 (1964) (effect of release of patent infringer); *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361-62 (1952) (effect of release of FELA claim); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704-07, 715 (1944) (effect of release of Fair Labor Standards Act claim); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 243-47 (1942) (effect of release of Merchant Marine Act claim). Volt's other two cases are even further off the mark. *See Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 175-76 (1942) (Sherman Act preempts use of common law estoppel rules to permit price fixing); *Liner v. Jafco, Inc.*, 375 U.S. 301, 308-09 (1964) ("local rules which purport to preclude state appellate court jurisdiction of [a] federal preemption claim cannot conclusively render the case moot for the purposes of this Court's review").

[9] Particularly where the law of the place they chose – the state – "ordinarily" (Volt's word) determines the interpretation question to begin with.

choice-of-law" – no "rule of general application."[10] Instead, Volt says the Court adopted the "specialized rule" that "law of the place where the project is located" means the law of the state where the project is located, not the laws of the United States. (O. Br. 38-40) That supposed rule, Volt goes on, is "precisely and narrowly intended to foreclose the application of federal law." (O. Br. 42) Therefore, Volt advises, the federal interest "in the substantive content" of the "specialized rule" is "of the same order of magnitude as the federal interest in the resolution of any question of federal supremacy." (O. Br.

---

[10] Volt claims that "earlier cases" hold that a state law principle does not provide an "independent state ground" where the principle is not of general application. (O. Br. 37-38) But: (1) We agree there is a federal question here [Question 1, above], and do not claim the Court of Appeal's interpretation of the contract is an "independent state ground" foreclosing review of that question. (2) Volt's cases do not say that a state law principle must be of "general application" anyway. They deal with other things. *See Ake v. Oklahoma*, 470 U.S. 68 (1985) (state procedural rule was not independent ground because its application turned on whether federal constitution was violated); *International Longshoreman's Ass'n v. Davis*, 476 U.S. 380 (1986) (federal preemption must be considered whenever it arises in state court); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (Court decided first amendment question, leaving state intellectual property question for state court); *South Dakota v. Neville*, 459 U.S. 553 (1983) (reversing State Court ruling suppressing evidence of refusal to take blood test); *Fox River Paper Co. v. Railroad Commission of Wisconsin*, 274 U.S. 651 (1927) (accepting State Court ruling on riparian rights); *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36 (1944) (accepting State Court ruling on property rights); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935) (accepting State Court ruling on severability of contract); *Abie State Bank v. Bryan*, 282 U.S. 765 (1931) (reviewing State Court estoppel ruling that turned on federal constitutional right).

40-41) Volt acknowledges that it lacks "supportive authority for this conclusion," but finds *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973), "the closest analogue." (O. Br. 41)

Little Lake Misere has nothing to do with Volt's proposition. It merely held invalid a state law that retroactively took away the property right of the United States and no one else. 412 U.S. at 597-601.[11] Volt's proposition likewise has nothing to do with this case. The Court of Appeal did not adopt any rule, much less a "specialized rule" intended "to foreclose the application of federal law." The Court simply interpreted a provision in the private contract before it, and determined what it meant. The Court – like the trial court – had "no doubt" what it meant.

There are indeed rules of "general application" which informed the Court's determination. They are familiar and hardly sinister: "A contract is to be interpreted according to the law and usage of the place where it is to be performed," and its words "are to be understood in their ordinary and popular sense. . . ." *See* California Civil Code §§ 1644, 1646.[12]

---

[11] See *Boyle v. United Technologies Corp.*, ___ U.S. ___, 56 U.S.L.W. 4792, 4793 (June 27, 1988) (noting *Little Lake Misere* and like cases dealt with "uniquely federal interest" that "obligations to and rights of the United States under its contracts are governed exclusively by federal law").

[12] We return to these familiar state rules at Argument, Part IV B, below. The Court did not cite those rules, nor did the parties, and there was no occasion to. The truth that the contract should be interpreted in accordance with its plain meaning and local usage was not in issue. No one suggested that federal law determined what the contract meant.

The "substantive content" of those common sense rules presents no federal – let alone Supremacy Clause – question.

3. Volt's Argument That FAA Rules of Construction Apply.

Volt says that "any interpretation of a contract determining the arbitrability of a dispute under the Federal Arbitration Act must be infused by a sympathetic attunement to the federal policy favoring arbitration." (O. Br. 49-50) Therefore, Volt says, "no state-court *construction of any contractual provision* which determines the arbitrability of a dispute subject to the Federal Arbitration Act can ever be truly independent of the influence of federal law." (O. Br. 51, emphasis added) Accordingly, Volt apparently concludes, the interpretation of the parties' choice-of-law clause is a federal question.[13]

Volt's proposition is amazing. According to it, federal law governs the interpretation of *"any"* provision in a

---

[13] Volt claims that *Fidelity Federal S. & L. Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), resolves the "jurisdictional issue" as to whether interpretation of this clause presents a federal question, "albeit *sub silentio*." (O. Br. 43) But silence states no rule. We address *Fidelity* on the merits in Argument, Part IV B, below.

Volt also says that interpretation of the clause is "necessarily dependent upon and interwoven with an issue of federal law," so it cannot be an "independent state ground" precluding review. (O. Br. 46-47) We do not contend that the interpretation of the agreement provides an independent state ground precluding review of the federal, but insubstantial, question present here. *See* Question 1, above. Accordingly, we do not respond to Volt's non-independent-state-ground arguments. (O. Br. 45-58)

contract in interstate commerce containing an arbitration clause, whatever the provision is, where the interpretation of it bears on arbitrability. So federal law becomes the potential determinant of the meaning of every clause in a private contract containing an arbitration clause, and *Swift v. Tyson* is, so far, born again.

That is not the law. The law is that the "federal substantive law of arbitrability" is applicable to the construction of the "arbitration agreement" itself, and requires that *that agreement* be "generously construed." *See Mitsubishi*, above, 473 U.S. at 626; *Moses H. Cone*, above, 460 U.S. at 24-25. Volt says the same thing elsewhere: "The [*Mitsubishi - Moses H. Cone*] rule requires that all *such agreements* [to arbitrate] be 'generously construed.'" (O. Br. 94; emphasis added.)

Federal law is not applicable to the interpretation of provisions in a private contract other than the arbitration agreement, whether or not their interpretation "bears on arbitrability." *Perry v. Thomas*, above, so holds. There, among other things, a party resisting arbitration argued that two parties seeking to enforce the arbitration agreement were not parties to the contract which contained the agreement, and therefore had no "standing" to enforce it. This Court observed that that argument "presents a straightforward issue of contract interpretation":

> As we perceive it, Thomas' "standing" argument simply presents a straightforward issue of contract interpretation: whether the arbitration provision inures to the benefit of appellants and may be construed, in light of the circumstances surrounding the litigants' agreement, to cover the dispute that has arisen between them.

107 S.Ct. at 2527

The resolution of that contract interpretation issue obviously "bore on arbitrability," indeed determined it. This Court nevertheless remanded that "issue" to the state court, and held that state law respecting the interpretation of contracts generally governed it (but that a state law principle that took "its meaning precisely from the fact that a contract to arbitrate is at issue" would not):

> [S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern the validity, revocability, and enforceability of contracts generally. A state law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2.

107 S.Ct. at 2527 n.9 (emphasis in original).

The rule could not be otherwise. If it were, federal law would determine the interpretation of a provision in a contract where it affected arbitrability, and state law would determine interpretation of the same provision in the same contract where it did not. So the same words in the same provision could mean different things depending on whether federal or state law determined what they meant. Parties do not use the same words in the same provision to mean different things.[14]

---

[14] For example, on Volt's theory the choice-of-law clause here would mean state-plus-federal law when applied to the arbitration clause, and state law only when applied anywhere else.

(Continued on following page)

The Court of Appeal interpreted the parties' choice-of-law clause, guided by California law respecting the interpretation of "contracts generally." It did not base its interpretation on any "state law that takes its meaning precisely from the fact that a contract to arbitrate is at issue . . . ." (*See* Part I B 2, above) Therefore its interpretation presents a state, not federal, question.

4. Conclusion As To Jurisdiction With Respect To Volt's Contract Interpretation Question.

We deal with Volt's arguments on the merits of this state contract question in the Argument, Part IV B. The merits do not bear on jurisdiction, but what Volt presumably wants this Court to do on the merits does. What does Volt want this Court to do in respect to the contract interpretation question Volt presents to it? Rule that the

---

(Continued from previous page)

Moreover, the choice-of-law provision here is arbitration neutral. California law is "friendly to arbitration," (p. 28 n.20, below) and some provisions of California law are more favorable to arbitration than federal law is. For example, California law provides four years to enforce an arbitration award and federal law one (CCP § 1288; 9 U.S.C. § 9); California law provides for discovery with respect to some arbitrations, and federal law provides for none (CCP §§ 1283.05, 1283.1); California law provides that the filing of a mechanics lien action does not waive the right to arbitrate, and federal law says nothing about that. (CCP § 1281.5) Volt's theory is that the choice-of-law clause must be interpreted to favor arbitration. (O. Br. 94) Is the clause to mean federal law when that is more favorable to arbitration, and California law when it is not, so the clause means different things at different times on that score as well?

Court of Appeal erred in interpreting the choice-of-law clause in these parties' private contract? Reinterpret the clause in that private contract? Hold that the words "law of the place where the project is located" mean state-plus-federal law in all private contracts? So hold (a) whether that is the popular meaning of the words or not or (b) because this Court finds that is the popular meaning of the words in (1) California or (2) everywhere?

None of those questions is federal. Even if any were, there is no occasion for this Court to answer them. Certainly the Court of Appeal's interpretation of this private contract does not draw in question the validity of a state statute as repugnant to the Constitution or laws of the United States, so the Court's interpretation is not subject to review by appeal under 28 U.S.C. § 1257(2).[15] Certainly none of those contract interpretation questions presents "special and important reasons" for review by certiorari under 28 U.S.C. § 1257(3) and Supreme Court Rule 17. Local courts ought to determine the meaning of words used locally. *See* pp. 31-37, below. This Court does not sit to determine what they mean, nor sit to review error, particularly state law error. *See Cal. Retail Liquor Dealers Ass'n v. Midcal Alum.*, 445 U.S. 97, 111-112 (1980) (this Court accords "great weight" to state's highest court on "matters of state law"); *Bishop v. Wood*, 426 U.S. 341, 346 n.10 (1976) (same; local courts are "familiar" with "local law and practice").

There was no error, state or federal, here.

---

[15] Volt's waiver cases (n. 8, above), for example, came to this Court by writ of certiorari, not by appeal under 28 U.S.C. § 1257(2).

II. STATEMENT OF THE CASE

The underlying dispute arises out of a construction project at the Stanford University campus adjoining Palo Alto, California. Volt was the construction contractor for the project. (J.A. 9, 29-35) During the course of construction, Stanford terminated the Volt contract because of Volt's material breaches of it. (J.A. 9) Volt then requested reinstatement, the parties negotiated about that, and they signed a reinstatement agreement. (J.A. 9-10) In the reinstatement agreement Volt agreed it would not seek any additional compensation for work it performed in order to remedy its past breaches of the construction contract. (J.A. 10)

On August 27, 1986, Volt presented Stanford with a demand for arbitration of a claim that seeks additional compensation for the work Volt performed to remedy its own breaches of the construction contract and for which it agreed it would not seek additional compensation. (J.A. 10-11, 48-52) Thus Volt violated the reinstatement agreement and broke its promise not to seek compensation for the corrective work its earlier breaches required. Volt claimed instead that the corrective work was necessary primarily because construction drawings and project management provided to Stanford by defendants Brian-Kangas-Foulk & Associates ("BKF&A") and Telecommunications International, Inc. ("TII") were inadequate. (J.A. 51-52)[16] Volt seeks to hold Stanford, as the owner of the property on which the project was constructed, liable for the claimed errors of TII and BKF&A.

---

[16] BKF&A and TII were defendants, but had not appeared when the motions to stay and compel arbitration were argued, and were not parties to the trial court's order staying arbitration, the subject of this "appeal."

The contract between Stanford and Volt provides that it shall be governed by the law of "the place where the Project is located." (J.A. 37) Subject to the provisions of the governing law and the rules of the American Arbitration Association, the parties also agreed to arbitrate disputes "relating to this contract or the breach thereof." (J.A. 40) The contracts between Stanford and TII and Stanford and BKF&A contain no arbitration provision. (J.A. 11-12, 44-45)

Volt points out that the arbitration clause in its contract provided that in "any other arbitration, *commenced or demanded pursuant to this Contract*, . . . either party . . . shall join in such arbitrations and agree to the consolidation of the arbitrations." (O. Br. 8; emphasis added) Volt says that that clause provides "for the consolidation of separate arbitrations that might arise from the parties' transaction," and so complains that that clause would have helped it consolidate arbitrations had Stanford not "inexplicably neglected to include arbitrations agreements" in its contracts with TII and BKF&A. (O. Br. 9-10) But: (1) That clause would not have helped Volt consolidate anything, because it does not apply to "consolidation of arbitrations that might arise from the parties' transaction." It only applies to consolidation of arbitrations "commenced or demanded pursuant to this contract," and neither TII or BKF&A was a party to the Volt-Stanford contract. (2) Volt has a cavalier view as to how agreements are made. One party does not just "include" provisions in them; both parties to them negotiate terms, and agree to some but not others. Stanford, TII and BKF&A did not agree to arbitrate. That is the fact that matters here.

On August 27, 1986, Stanford and Volt concluded settlement discussions seeking to resolve their dispute.

That is the same day that Volt filed its arbitration demand. (J.A. 48-52) One week later, on September 4, 1986, Stanford filed its complaint in the Superior Court, naming as defendants Volt, BKF&A and TII. (J.A. 6-27) The complaint states claims against Volt based upon, among other things, fraud, estoppel, breach of contract, and bad faith denial of the existence of a contract. It also asks for a judgment declaring that, if Stanford is held liable to Volt on account of TII or BKF&A's errors, then TII or BKF&A must indemnify Stanford for any amounts it must pay Volt.

Stanford could not arbitrate its indemnity claims against TII and BKF&A, because it had no arbitration agreement with either of them. If Stanford were forced to arbitrate Volt's claims alone before an arbitrator, the arbitration could result in a determination that TII and BKF&A drawings or TII's project management were inadequate, and an award for Volt. If Stanford then were forced separately to litigate its indemnity claims against TII and BKF&A in court, TII and BKF&A might not be bound by the arbitrator's award. A court or jury could find that their drawings and management were adequate, and deny indemnity. That would be most unfair. If Volt were at fault, it must suffer its losses. If TII and BKF&A were at fault, it must pay for those losses. Stanford should not have to pay for them in any case, because the fault was either Volt's or TII's and BKF&A's, not Stanford's.

Stanford filed its lawsuit in Superior Court to avoid the danger of those conflicting results and to resolve all these disputes at the same time and place. The Superior Court was the only forum in which Volt's claims against Stanford and Stanford's claims against Volt, TII and BKF&A all could be resolved at the same time and place.

Volt moved to stay the Superior Court proceeding while the arbitration went forward, and Stanford sought an order under CCP § 1281.2(c) staying the arbitration while the litigation went forward. CCP § 1281.2(c) provides that (1) where a party to an arbitration agreement is also a party to a court action; and (2) where the Court action and arbitration arise out of the same transaction; and (3) where there is a possibility of conflicting rulings on common questions of law and fact, the Superior Court may stay the arbitration and try those common questions in a single proceeding. Section 1281.2(c)'s purpose is to avoid piecemeal litigation and conflicting rulings. All three of its conditions were met here.

Volt argued to the Superior Court that the clause in the parties' agreement providing that the agreement shall be governed by the "law of the place where the Project is located" did not mean that California law, where the Project is located, governed. Rather, Volt said, the agreement was in interstate commerce; the FAA accordingly applied to it, absent the choice-of-law clause; and the choice-of-law clause changed nothing, since it really meant that the FAA, not California law, governed. The FAA contains no counterpart provision to CCP § 1281.2(c). Accordingly, Volt's argument concluded, § 1281.2(c) did not apply here.

The Superior Court found that the parties meant that California law was to govern their agreement. (*See* J.A. 59-60; O. Br. 13) Accordingly, the Superior Court held that CCP § 1281.2(c), which is part of California law, applied, and stayed the arbitration under it. (J.A. 59-60)

Volt appealed to the Sixth Appellate District Court of Appeal. The Court of Appeal affirmed. It did not "find reasonable Volt's interpretation that the 'place' where the project is located be construed to mean not only the State of California but also the nation of the United States of America." It found that the "word 'place' was intended to mean the forum state," and it had "no doubt" the parties meant that. (Dec. J.A. 66)

The court further found that the parties' agreement did not violate federal law, because "the thrust of the federal law is that arbitration is strictly a matter of contract." (Dec. J.A. 71) The FAA does not "mandate the arbitration of all claims, but merely the enforcement . . . of privately made arbitration agreements." (Dec. J.A. 69-70, *quoting Dean Witter Reynolds, Inc. v. Byrd*, above, 470 U.S. at 213) "The parties are at liberty," the court went on, "to choose the terms under which they will arbitrate, and such a choice will not run afoul of the FAA." (Dec. J.A. 72) The court concluded that "were the federal rules to be imposed in this case to override the parties' choice of law, the effect would be to force the parties to arbitrate where they had agreed not to arbitrate. This result is . . . inimical to the policies underlying state and federal arbitration law. . . ." (Dec. J.A. 73)[17]

The court enforced the agreement, including its choice-of-law clause, according to its terms. Volt

---

[17] The court also found that the parties could have "expressly stated in their agreement that they wished to arbitrate only those disputes between themselves which did not involve third parties not bound by the arbitration agreement. . . ." (Dec. J.A. 72) Volt agrees. (O. Br. 84) The court determined that by their choice-of-law clause the parties essentially agreed to the same thing. *See* pp. 29-30, below.

petitioned the Supreme Court of California for review. It told the Supreme Court that the "principal issue" presented by this case was whether the Court of Appeal misinterpreted the choice-of-law clause. (Volt's Petition for Review at 1) The Supreme Court denied the petition and directed that the Court of Appeal's decision not be published. (J.A. 87)

This appeal followed, and was timely filed. (O. Br. 5)

III. SUMMARY OF ARGUMENT

The trial court found that the parties had agreed that California law, of which CCP § 1281.2(c) is a part, was to govern their contract. The court applied § 1281.2(c) to the contract, issued a stay under it, and so enforced the contract in accordance with its terms. That is exactly what the court should have done.

Arbitration is a matter of agreement and the FAA does not change that. To the contrary, it makes arbitration agreements enforceable according to their terms, no more, no less; every case decided by this Court under the FAA so holds. The Court of Appeal simply followed that settled law. It concluded that forcing the parties to arbitrate under federal, not state, rules when they had agreed to arbitrate under state, not federal, rules would turn the FAA upside down. That is certainly right. (Part IV A, below.)

Volt's complaint that the Court of Appeal misinterpreted the contract presents a state, not federal, question. Volt's argument is also wrong. The agreement provides that it shall be governed "by the law of the

place where the project is located." The court interpreted the agreement to mean that California law, the place where the project was located, governs. That is what it says on its face. Volt argues that the agreement really means "California law plus all laws of the federal government that would otherwise apply." That is not what it says on its face.

California law provides that the words of a contract are to be understood in "their ordinary and popular sense, rather than their strict legal meaning," and according to local "usage." Ordinary people in California use the words "law of the place where the project is located" to mean law of the state where the project is located. They do not use those words to mean law of the state, plus "all laws of the federal government that would otherwise apply . . . ." The Court of Appeal had "no doubt" about that, and this Court, with great respect, is not in a position to doubt it. Part IV B, below.

Nor should it. Volt's arguments that the contract means what ordinary people would not take it to mean are contrived, and make no common sense. Volt points to the technical "literal terms" of the contract, but popular usage, not literal accuracy, is the test. Volt points to "basic tenets" of federal jurisprudence, but popular usage, not jurisprudence, is still the test. Volt invites the same words in the same phrase of the same contract to mean different things at the same time, but ordinary people do not use words that way. In sum, there is no ground or occasion for this Court to determine that the words "law of the

place where the project is located" mean what Volt says they mean in California, or anywhere else. Part IV B, below.

Volt points out that the FAA contains no counterpart provision to § 1281.2(c), and that an FAA procedural rule compels arbitration notwithstanding the duplicative litigation and inconsistent judgments an order to compel might cause. Volt asserts that there is "no serious controversy" that, absent the parties' agreement, that FAA rule would obtain in this state court proceeding.

This Court need not reach that assertion, because the parties' agreement is not absent, and it is valid. But if the Court does reach it, the assertion is false. The "substantive law" of the FAA does apply in federal and state court; but this Court has expressly not held that §§ 3 and 4 of the FAA, its procedural sections, apply in state court, let alone that its rule compelling-arbitration-notwithstanding-duplicative-litigation-and-inconsistent-judgments does.

There are three very good reasons to hold that they do not. First, §§ 3 and 4 apply by their terms to federal, not state court, proceedings. Second, the FAA's legislative history shows that Congress meant what it said. Third, the procedural business of state courts is ordinarily the business of state courts, and federal law generally takes state courts as it finds them. No federal interest demands that a state court compel piecemeal litigation or effect inconsistent judgments contrary to state law. Part IV C, below.

The appeal should be dismissed or the judgment affirmed. Part V, below.

IV. ARGUMENT

A. THE FAA ENFORCES AGREEMENTS IN ACCORDANCE WITH THEIR TERMS, NO MORE, NO LESS.

The Court of Appeal interpreted the parties' agreement under state law, and found that the parties had agreed that the "laws of California, of which CCP § 1281.2 is certainly a part, are to govern the contract." (Dec. J.A. 65) The Superior Court thus properly applied CCP § 1281.2(c) in accordance with the agreement, issued a stay under it, and so enforced the agreement in accordance with its terms. *See* pp. 21-22, above.

The question is whether the FAA prohibits a state court from applying state rules to an arbitration agreement in accordance with the agreement's terms. The answer is no. Federal law preempts state law which "stands as an obstacle to" – that is, conflicts with the accomplishment of – the purpose of federal law. *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941).[18] A state court order enforcing an arbitration agreement in accordance with its terms does not conflict with the FAA or any other federal law. Rather, it follows federal law and effects its purpose, exactly.

Arbitration is a matter of agreement. A court cannot force parties to arbitrate a dispute they have not agreed to arbitrate. They can agree to arbitrate in any way they

---

[18] Federal law may also preempt state law expressly or by occupying the field. *Michigan Canners & Freezers Assn. v. Agricultural Marketing & Bargaining Board*, 467 U.S. 461, 469 (1984). The FAA contains no express preemption provision, and it does not occupy the field of arbitration law. *See, e.g., Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956). No one claims otherwise.

want; thus they can agree to arbitrate some disputes and not all, or in some circumstances and not all, or not at all.

Nothing in the FAA changes any of that or takes those rights away. Again, the contrary is so. The FAA is meant to enforce the parties' agreement, whatever it is, no less and no more than it is. Its purpose is to "make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin*, 388 U.S. 395, 404 n.12 (1967); H.R. Rep. No. 96, 68th Cong., lst Sess. 1 (1924); *see* pp. 2-3, above.

Prima Paint is the seminal case, and illustrates the point. It held that a claim for fraudulent inducement was arbitrable where the parties had agreed that it was. It also observed that that claim would not be arbitrable "where the parties otherwise intend." 388 U.S. at 402. No one so much as claimed that the parties were "not entirely free" to otherwise intend, and "so contract." 388 U.S. at 406.

Accordingly, the FAA makes arbitration agreements enforceable in accordance with their terms,[19] but only in accordance with their terms. Every case since *Prima Paint* so holds. Thus, the FAA preempts state laws which prohibit arbitration of disputes the parties have agreed to arbitrate. For example, the FAA preempts the California Corporations Code to the extent it prohibits arbitration of state franchise claims the parties had agreed to arbitrate; the Code could not be "applied to invalidate a contract for arbitration," and "to nullify a valid contract made by private parties. . . ." *Southland Corp.*, above, 465 U.S. at

---

[19] The FAA applies to agreements in interstate commerce and to maritime agreements, not all agreements. *See* 9 U.S.C. §§ 1-2.

6, 7. Again, the FAA preempts the California Labor Code to the extent it prohibits arbitration of wage claims the parties had agreed to arbitrate; the purpose of the FAA is to "enforce private agreements into which parties have entered. . . ." *Perry v. Thomas*, above, 107 S.Ct. at 2525-26 (citations omitted).

The converse is also true. The FAA does not "mandate the arbitration of all claims, but merely the enforcement – upon the motion of one of the parties – of privately negotiated arbitration agreements." *Dean Witter Reynolds, Inc. v. Byrd*, above, 470 U.S. at 219. The FAA likewise does not mandate what parties must arbitrate, or how or under what circumstances; private parties are free to limit the "scope" of their agreement as they see fit. *See Mitsubishi*, above, 473 U.S. at 628 (citing *Prima Paint*, above). The Court's job, to end at the beginning, is to enforce the parties' agreement in accordance with its terms, no more, no less. *Accord Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit"); *Moses H. Cone*, above, 460 U.S. at 20 (federal court should compel arbitration even if that causes piecemeal litigation "where necessary to give effect to an arbitration agreement"); *Shearson Amer. Express, Inc. v. McMahon*, ___ U.S. ___, 107 S. Ct. 2332, 2346 (1987) (holding parties "to their bargain" to arbitrate Exchange Act and RICO claims); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-20 (1974) (holding that "the agreement of the parties . . . to arbitrate any dispute [including l0b-5 claim] arising out of their international commercial transaction is to be respected and enforced by the federal courts").

The Court of Appeal did not violate those basic principles of federal arbitration law.[20] It set them forth, correctly, embraced them, followed them, and so enforced the parties' agreement in accordance with its terms. It held "that the parties are at liberty to choose the terms under which they will arbitrate, and such a choice will not run afoul of the FAA." (Dec. J.A. 72) It concluded that it would violate those basic principles of arbitration law were the Court not to enforce the parties' agreement, including its choice-of-law clause, in accordance with its terms (Dec. J.A. 72-73):

> "Were the federal rules to be imposed in this case to override the parties' choice of law, the effect would be to force the parties to arbitrate where they agreed not to arbitrate. This result is not only inimical to the policies underlying state and federal arbitration law, . . . it also violates basic principles of contract law."

Accord Chan v. Drexel Burnham Lambert, Inc., above, 178 Cal. App. 3d at 640, 645:

---

[20] The Court observed that California law is exactly the same, (Dec. J.A. 71-72), as it is. *See, e.g., Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 67 Cal. App. 3d 19, 32 (1977):

> "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."

Accord, O'Malley v. Wilshire Oil Co., 59 Cal. 2d 482, 496 (1963); *Chan v. Drexel Burnham Lambert, Inc.*, 178 Cal. App. 3d 632, 640, 645 (1986). California indeed has an "historical friendliness . . . to the institution of arbitration." *See Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 132 (1973) (*quoting* Feldman, *Arbitration Modernized – The New California Arbitration Act*, 34 S. Cal. L. Rev. 413, 414 (1961)).

> "Arbitration is recognized as a matter of contract, and a party cannot be forced to arbitrate something in the absence of an agreement to do so." (*Vespe Contracting Co. v. Anvan Corporation* (E.D. Pa. 1975) (399 F. Supp. 516, 520.) The [federal] Act " 'does not dictate that we should disregard parties' contractual agreements . . . outlining the boundaries of the areas intended to be arbitrable.' " (*Pas-Ebs v. Group Health, Inc.* (S.D.N.Y. 1977) 442 F. Supp. 937, 940), and there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate. (*Delta Lines, Inc. v. International Brotherhood of Teamsters* (1977) 66 Cal. App. 3d 960, 966 [136 Cal. Rptr. 345])."

That is the heart of the Court of Appeal's decision, but Volt does not address it. Nor does Volt dispute those basic principles, or contend that they do not apply here. Indeed, to the extent Volt says anything on the point it proves the point. It says that notwithstanding the FAA, Stanford could have dealt with "the possibility of simultaneous disputes with the several participants in the project [not parties to the arbitration agreement] and the consequent problem of duplicative litigation"; all Stanford need have done, Volt states, is to insert "a proviso expressly excusing it from its duty to arbitrate in the event of such disputes with non-parties to the agreement." (O. Br. 83-84.) The Court of Appeal held that that, in effect, is exactly what Stanford and Volt agreed to do.

> "If the parties here had expressly stated in their agreement that they wished to arbitrate only those disputes between themselves which did not involve third parties not bound by the arbitration agreement, this provision would presumably be enforceable. *In our view they accomplished the same thing by choosing to be governed by California law, thus incorporating the*

California rules of civil procedure governing arbitration agreements." (Dec. J.A. 72; Emphasis added.)[21]

Volt's sole answer is this: Assuming the agreement means what the Court of Appeal found it to mean, Volt says, enforcing it in accordance with its terms would violate "a fundamental public policy of the jurisdiction [the United States] whose law would apply" but for the agreement. (O. Br. 97) That "fundamental policy," Volt goes on, is "a liberal federal policy favoring arbitration agreements." (O. Br. 102; *see generally* O. Br. 96-106.) That proposition disproves itself. One does not violate a policy favoring arbitration agreements by enforcing arbitration agreements in accordance with their terms. One does violate the law requiring enforcement of arbitration agreements in accordance with their terms by not enforcing them in accordance with their terms.[22]

---

[21] *Moses H. Cone*, above, holds that a federal court should compel arbitration even if that causes piecemeal litigation "where necessary to give effect to the arbitration agreement." 460 U.S. at 20. Even if that rule were applicable in state court proceedings (it is not – see Argument, Part IV C), it would not be applicable here; a rule requiring piecemeal litigation would have been at odds with these parties' agreement, not "necessary to give effect" to it.

[22] The liberal federal policy favoring arbitration agreements is simply "at bottom a policy guaranteeing the enforcement of private contractual arrangements." *Mitsubishi*, above, 473 U.S. at 625.

Volt relies on *The Kensington*, 183 U.S. 263 (1902), *Mitsubishi*, above, and *Scherk v. Alberto-Culver Corp.*, above. Volt is way off target. Those cases hold that parties cannot by agreement avoid the substantive commands of statutes that apply

(Continued on following page)

We turn to the Court of Appeal's interpretation of the agreement.

B. THE CONTRACT MEANT WHAT THE TRIAL COURT AND COURT OF APPEAL FOUND IT MEANT.

Volt does not attack the settled and controlling principles on which the Court of Appeal's decision is based. Instead, it complains that the Court of Appeal misinterpreted a clause in the parties' contract. That clause, Volt says, "must be interpreted" to provide that it is to be governed by state law plus "all laws of the federal government that would otherwise apply. . . ." (O. Br. 66, 75).

Volt is way off base. First, what the clause means is a state, not federal question. *See* pp. 5-16, above, and 35-37, below. Second, Volt is wrong on the merits, should this Court reach them.

The agreement provided that it "shall be governed by the law of the place where the project is located." The place the project was located was California, and there is no place called federal. Therefore, the contract means that California law, the place the project was located, governs. The trial court and Court of Appeal had "no doubt" about that (Dec. J.A. 66), and the parties, who contracted in California, must be taken to have known it; the year

---

(Continued from previous page)

regardless of agreements. Thus a carrier cannot evade its statutory liability by agreement (*Kensington*), an automotive company cannot avoid the antitrust laws by agreement (*Mitsubishi*), and a seller (perhaps) cannot avoid liability under 10b-5 by agreement (*Scherk*). But here the FAA imposes no obligations regardless of agreement; it makes agreements to arbitrate enforceable in accordance with their terms, no more, no less.

before their "agreement was forged," the California Court of Appeal so held. *Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co.*, 140 Cal. App. 3d 251 (1983) (Dec. J.A. 67).[23]

The Court of Appeal's decision and *Garden Grove* hardly stand alone. The Court of Appeal pointed out that "[c]ourts in other states faced with identical language have reached the same result we do here," citing *Standard Co. v. Elliott Constr. Co.*, 363 So. 2d 671 (La. 1978), *Eric A. Carlstrom Constr. Co. v. Independent School Dist. No. 77*, 256 N.W. 2d 479 (Minn. 1977), and *Lane-Tahoe, Inc. v. Kindred Constr. Co.*, 536 P.2d 491 (Nev. 1975). Volt agrees that *Standard* reached that result, but objects that *Carlstrom* and *Lane-Tahoe* have no "bearing"; "the possible application of federal law" was not at issue there, Volt says. (O. Br. 90 n.) Volt misses the point. *Carlstrom* and *Lane-Tahoe* both hold that a clause identical to the one at issue here plainly means that arbitration is to proceed in accordance with the laws of the state in which the project is located. 256 N.W. 2d at 483; 536 P. 2d at 493. That is the point.

Carlstrom and *Lane-Tahoe* are in accord with a large body of case law from around the country. That body holds that the "law of the place where the project is located" plainly means the law of the state where the

---

[23] Volt points to *Liddington v. The Energy Group*, 192 Cal. App. 3d 1520 (1987) (O. Br. 70, 92 n.), which interpreted a contract Volt's way. But *Liddington* postdated the parties' agreement, did not discuss the reason for its holding, and did not reach the centerpiece of the Court of Appeal's decision here. (Dec. J.A. 75-76) Volt also points to *Ford v. Shearson Lehman Amer. Express Co.*, 180 Cal. App. 3d 1011 (1986), but *Ford* did not discuss the contract interpretation question involved here.

project is located. *McCarthy Bros. Const. Co. v. Pierce*, 832 F.2d 463, 466 n.4 (8th Cir. 1987); *Pickens v. Hess*, 573 F.2d 380, 384 (6th Cir. 1978); *Safer v. Perper*, 569 F.2d 87, 91 (D.C. Cir. 1977); *Starr Elec. Co., Inc. v. Basic Const. Co.*, 586 F. Supp. 964, 968 (M.D.N.C. 1982); *United States Fidel. & G. Co. v. Bangor Area Jt. Sch. Auth.*, 355 F. Supp. 913, 914 (E.D. Penn. 1973); *Standard Co. v. Elliott Const. Co., Inc.*, 363 So. 2d 671 (La. 1978); *Coover Const. Co. v. Johnson*, No. 83 AP-235, slip op. (Ohio Ct. App. August 4, 1983).[24]

Carlstrom and *Lane-Tahoe* are also in accord with a long list of federal statutes. They plainly use "law of the place [of a transaction]" to mean the law of the state where the transaction occurs. *See* 28 U.S.C. § 1346(b) (providing that the United States is liable under the Federal Tort Claims Act "in accordance with the law of the place where the act or omission occurred"; law of the place means state law as to damages, *Richards v. United States*, 369 U.S. 1, 11 (1962); *Stoleson v. United States*, 708 F.2d 1217 (7th Cir. 1983); *Smith v. Pena*, 621 F.2d 873 (7th Cir. 1980); *Southern Pac. Transp. Co. v. United States*, 471 F. Supp. 1186 (E.D. Cal. 1979); *United States v. Sutro*, 235 F.2d 499 (9th Cir. 1956), and state conflict-of-law principles, *see, e.g., Richards*, above, 369 U.S. at 11; *Ducey v. United States, 713 F.2d 504, 508 n.2 (9th Cir. 1983); Gelley v. Astra Pharmaceutical Products, Inc.*, 610 F.2d 558, 560 (9th Cir. 1979); *J.W. Petersen Coal & Oil Co. v. United States*, 323 F. Supp. 1198, 1205 (N.D. Ill. 1970); *Gowdy v. United States*, 412 F.2d 525, 527 (6th Cir. 1969)); 28 U.S.C. § 2674 (limiting liability of United States to compensatory damages in

---

[24] Those cases do not deal with a federal-versus-state-law question. They demonstrate the point *Carlstrom* and *Lane-Tahoe* demonstrate – "law of the place where the project is located" is commonly used to mean state law.

wrongful death cases where "the law of the place where the act or omission complained of occurred" provides for punitive damages only; law of the place means state law, *Bowen v. United States*, 570 F.2d 1311 (7th Cir. 1978)); 28 U.S.C. § 2672 (providing for settlement of claims against the federal government where the United States "would be liable to the claimant in accordance with the law of the place where the act or omission occurred"; law of the place means state law governs effect of release, *Robinson v. United States*, 408 F. Supp. 132, 136 (N.D. Ill. 1976)); 38 U.S.C. § 103(c) (providing that "whether or not a person is or was the spouse of a veteran" is to be determined "according to the law of the place where the parties resided"; that means state law on its face, where parties resided in a state); 28 U.S.C. § 534(a)(3) (providing that the Attorney General shall acquire information to locate any missing person, "including an unemancipated person as defined by the laws of the place of residence of such person"; that means state law on its face, where person resides in state); 18 U.S.C. § 1821 (prohibiting, in part, the interstate transportation of dentures without the authorization of a person "licensed to practice dentistry under the laws of the place into which such denture is sent or brought"; that means state law on its face, where the place is a state.) *See also* Uniform Code of Military Justice, 28 U.S.C. § 849(c), which makes it explicit that the laws of the place and the laws of the United States are different:

> Depositions may be taken before and authenticated by any military or civil officer authorized by the *laws of the United States or by the laws of the place* where the deposition is taken to administer oaths. (Emphasis added.)

Volt cites cases that interpret "place" its way, and we will deal with them. (*See* pp. 41-42, below.) But the purpose of the exercise is not to add up cases and statutes on

either side. The cases and statutes we cite just reflect what real people mean by the ordinary words "place where something is located." The purpose of the exercise was and is to determine what these real people – Volt points out they were "business executives," not lawyers (O. Br. 83) – meant by those ordinary words here. Certainly that was the Court of Appeal's task.

California law provides that "the words of a contract are to be understood in their ordinary and popular sense, rather than their strict legal meaning . . . ," and in accordance with the "usage" of the "place" where the project is to be performed. Cal. Civ. Code §§ 1644, 1646.[25] Those rules are well known and settled, and the case law follows them: " 'The terms of the contract are to be understood in their ordinary and popular sense and as a man of average intelligence and experience would understand them.' " *Morton v. Travelers Indemnity Co.*, 121 Cal. App. 2d 855, 858 (1953) *quoting Burr v. Western States Life Ins. Co.*, 211 Cal. 568, 575 (1931). "The terms of a writing are presumed to have been used in their primary and general acceptation." *Jenne v. Jenne*, 192 Cal. App. 2d 827, 830 (1961). "The common or usual meaning will be ascribed to words used in a contract unless the context or circumstances indicate that in a particular case a special meaning should be attached to them." *Reliance Life Ins. Co. v. Jaffe*, 121 Cal. App. 2d 241, 245 (1953).

---

[25] California Civil Code § 1644 goes on to provide:

> "[U]nless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

There was no showing that the parties used the word "place" in a technical sense; they were, again, businessmen, not lawyers.

Volt apparently invites this Court to reinterpret the contract (pp. 5-6, above), but it is unclear under what principle and rules of contract interpretation Volt asks the Court to do it. There is no general federal common law of contracts; *Swift v. Tyson* is long gone and unmourned. *See* p. 6, above. It would, at the least, be startling were this Court to cause *Swift* to be born again, or to undertake to interpret this contract under it or some mutant of it. But if the Court did, presumably it would apply the same common sense rules of interpretation that obtain in California. For it would make no sense to interpret popular words in an unpopular way, or to interpret words used in one place in accordance with the usage of some other place.

Ordinary people in California use the words "law of the place where the project is located" to mean law of the state where the project is located. That seems natural. Ordinary people in California do not use those words to mean law of the state, plus "all laws of the federal government that would otherwise apply. . . ." (O. Br. 66, 75) That seems unnatural. Perhaps that local usage is parochial, even uninformed. If so, it is regrettable, but it is the fact. The Court of Appeal had "no doubt" about that, and found Volt's interpretation to the contrary "unreasonable." This Court, with great respect, is not in a position to doubt it, nor should it. States undertake to "deal with the whole gamut of problems cast up out of the flux of everyday life in the state," in part because, being where the flux is, they are in a position to deal with it. *See* Hart, above, 54 Colum. L. Rev. at 491.

Volt worries that the Court of Appeal's interpretation of the contract makes the contract "dispositive of an issue of federal preemption." (O. Br. 70) But it does not; Volt need not worry. If federal law preempts California law regardless what the parties agreed to, it does and it

applies. If federal law prohibits these parties from making an agreement to arbitrate in accordance with the rules set forth in California law, it does and the agreement falls. Obviously parties cannot agree to do what federal law prohibits, or be free of duties federal law imposes without regard to what they agree to. *See* pp. 30-31 n.22, above. But federal law does not prohibit the agreement these parties made or impose duties on them they did not discharge; federal law provides that parties' agreements to arbitrate – whatever their terms – are to be enforced according to their terms, no more, no less. The Court of Appeal followed that law. Part IV A, above.

We turn to Volt's six contract interpretation contentions.

1. The Argument that the Court of Appeal's Interpretation of the Contract "Is Discordant With the Common Understanding of the Function" of Choice-Of-Law Clauses.

Volt says that choice-of-law clauses do not (a) "encompass federal-state relations" or (b) "federal supremacy." (O. Br. 66-73) But as to (a) they do, and it does not matter what one calls the clause. *See* pp. 7-8, above. As to (b), this clause does not undo federal supremacy, and of course cannot. *See* pp. 30-31, above.

Volt cites no case that holds what it says, but refers to "sub silentio" decisions. (O. Br. 68, 72) A silent decision announces no rule.

2. The Argument That The "Literal Terms of the Parties' Contract" Mean What Volt Argues They Mean.

Volt says that the "only literally correct interpretation of . . . 'law of the place where the project is located' . . . is

that it constitutes a collective reference to the laws" of the City, the County, the State and the United States, "within whose boundaries the project was in fact situated." (O. Br. 75) Perhaps that is an available interpretation, technically, although one ought to add the laws of gravity, physics, nations, and so on to be complete. But words in a contract are to be given their "popular," not "technical," meaning (Cal. Civ. Code § 1644, pp. 35-36, above), and Volt's is hardly the popular meaning.

Volt adds that unless the clause is interpreted its way, the provisions of the contract requiring the contractor to pay "all taxes . . . applicable to the contractor's work" and to comply with "all applicable laws . . . bearing on . . . safety" would mean California taxes and California safety laws only. (O. Br. 76-77) That is nonsense. California law governs the agreement, and requires that words be given their plain meaning. All applicable taxes and safety laws plainly means all applicable taxes and safety laws.[26]

3. The Argument That "Basic Tenets of Federalism Dictate" That The Agreement Be Interpreted Volt's Way.

Volt advises that "the basic tenets of American federalism" hold that "federal law constitutes an integral part of the law of every state and of every 'place' within the

---

[26] Also the tax and safety laws "apply" regardless of agreement. Therefore, the parties could not have contracted out of liability for them if they had wanted to. The FAA, by contrast, imposes no obligation absent agreement, and only makes agreements enforceable in accordance with their terms.

federal union," citing, among other things,[27] *Federalist*, Nos. 16, 27. (O. Br. 77) That may well be so as a matter of jurisprudence. But the question, "quintessential or not" (O. Br. 49), is not jurisprudential. The question is what ordinary people – who do not travel with the *Federalist* – mean by ordinary words.

Volt also points to *Fidelity Federal S & L Assn. v. de la Cuesta*, 458 U.S. 141 (1982) (O. Br. 80). *Fidelity* did hold that the phrase "law of the jurisdiction in which the property is located" meant state and federal law, because "the 'law of the jurisdiction' includes federal as well as state laws." 458 U.S. at 157 n.12. The *Fidelity* clause and contract are different from this one. *Fidelity's* clause used the technical word "jurisdiction" in the abstract; this clause uses the common, physical word "place." Moreover, the *Fidelity* clause came from a uniform mortgage instrument issued by a federal agency which had expressly mandated that federal law was to preempt state law prohibiting due-on-sale clauses (458 U.S. at 147, 157 n.12); it would have been self-defeating to promulgate a uniform instrument containing a clause intended to undo that express mandate, and this Court found that the purpose of the clause was otherwise. *Ibid.*

---

[27] Volt's cases (O. Br. 78-80) merely stands for the proposition that state courts with concurrent jurisdiction over federal rights must enforce them. *See Claflin v. Houseman*, 93 U.S. 130 (1876) (concurrent jurisdiction permissible); *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1 (1912) (Connecticut courts required to enforce FELA claim); *Testa v. Katt*, 330 U.S. 386 (1947) (Rhode Island court required to enforce treble damage claim under Emergency Price Control Act); *Hauenstein v. Lynham*, 100 U.S. 483 (1880) (federal treaty preempts state law).

In sum, *Fidelity* dealt with the contract before it. It did not lay down a "specialized rule" of federal common law requiring that all clauses the same as, or more or less like, its clause, be interpreted the same as its clause in all private contracts in all places. The question remains, what did the parties mean here? The Court of Appeal found what they meant and, besides that being a state question, the Court was right. *See* pp. 5-16, above.

4. The Argument That "The Only Evidence In The Record Regarding The Parties' Intent . . . Suggests" That Volt's Interpretation Is Right.

Volt says that the "clause might be susceptible to the interpretation placed upon it by the Court of Appeal if it clearly appeared from the evidence" that that is what the parties meant. (O. Br. 81-82) But, Volt goes on, "what little evidence exists on this subject suggests" that the parties' intent "was precisely the opposite of the one attributed to them by the" Court of Appeal. (O. Br. 82)

Volt's "evidence" is its announcement that "Stanford could easily have dealt with this problem [of duplicative litigation] by inserting a proviso expressly excusing it from its duty to arbitrate in the event of . . . disputes with non-parties to the agreement." (O. Br. 83-84) But the Court of Appeal found that that is what the parties, by their choice-of-law clause, in effect did. *See* pp. 29-30, above.

Volt's argument proves nothing about intent. It does prove: (1) That the FAA permits the parties to limit the scope of their agreement to arbitrate in the way the Court of Appeal found they in effect did (*see* pp. 26-30, above); and (2) That the question of intent turns on "evidence," not the Constitution, and therefore presents no federal question.

5. The Argument That "The Overwhelming Weight of Authority . . . Supports" Volt's Interpretation.

Volt claims that an "imposing panoply" of case law supports its interpretation of the parties' contract, and a "meager minority" supports the Court of Appeal's. (O. Br. 90)

Volt's numbers are, to start with, wrong. The "panoply" is made up of three decisions of this Court and 21 decisions of lower courts. Of the three decisions of this Court, one, *Fidelity*, is discussed in subsection 3, above; it does not decide this contract interpretation question. The other two, *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, and *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, do not address the issue at all; they are what Volt calls "sub silentio" rulings (O. Br. 86), and their silence proves nothing.

Of the 21 lower court decisions, eleven (O. Br. 88-89) are also "sub silentio" rulings, and their silence proves nothing either. That leaves ten. Of the ten, two, *Episcopal Housing Corp. v. Federal Ins. Co.*, 239 S.E. 2d 647, 650 n.1 (S.C. 1977) and *Huber, Hunt & Nichols v. Architectual Stone Co.*, 625 F.2d 22, 25 n.8 (5th Cir. 1980), are based on Volt's literal meaning theory (O. Br. 87); but the purpose is to determine what the parties meant, not some literal meaning. *See* pp. 31-37, above.

That leaves eight. Of the eight, four, *Burke County Public Schools v. The Shaver P'ship*, 279 S.E. 2d 816, 823, 825 (N.C. 1981); *Mamlin v. Susan Thomas, Inc*, 490 S.W. 2d 634, 637 (Tex.Civ.App. 1973); *Commonwealth Edison Co. v. Gulf Oil Corp.*, 541 F.2d 1263, 1270 (7th Cir. 1976); and *Tennessee River Pulp & Paper Co. v. Eichleay Corp.*, 637 S.W. 2d 853, 857 (Tenn. 1982), are based on Volt's jurisprudential theory (O. Br. 88); but jurisprudence is not the question here. *See* pp. 5-16, above.

That leaves the last four, *Paul Allison, Inc. v. Minikin Storage, Inc.*, 486 F. Supp. 1, 3 (D. Neb. 1979); *State ex rel. St. Joseph Light & Power Co. v. Donelson*, 631 S.W. 2d 887, 891-92 (Mo.App. 1982); *Mesa Operating Ltd. P'ship, v. Louisiana Intra State Gas Corp.*, 797 F.2d 238, 243-44 (5th Cir. 1986); *Cone Mills Corp. v. August F. Nielsen Co.*, 455 N.Y.S. 2d 625, 627 (N.Y. Sup. Ct. 1982).[28] They are based on Volt's theory that enforcement of the parties' agreement in accordance with its terms violates the FAA, which requires Courts to enforce arbitration agreements in accordance with their terms (O. Br. 88-89); that theory stands the FAA upside down. *See* p. 30, above.

On the other side. Stanford's authorities are hardly a "meager minority." (*See* pp. 32-34, above.) They are, perhaps, a major mass. But, again, names do not matter. The purpose of the inquiry is not to add up authorities on either side and see which stack is higher. The purpose is to determine what these parties meant by the ordinary words they used in their contract. That remains a state question and the Court of Appeal's answer to it remains right.

6. The Argument That The Choice-Of-Law Clause Must Be Generously Construed Because Arbitration Agreements Must Be.

Volt says last, that federal law requires that "any ambiguities in arbitration agreements within the coverage of the Act should generally be resolved in such a way as to favor arbitration of the parties' dispute." (O. Br. 94) But: (1) The choice-of-law clause was not ambiguous here; the Court of Appeal had "no doubt" about it. (2)

---

[28] Volt cites *Commonwealth Edison Co. v. Gulf Oil Corp*, above, and *Huber, Hunt & Nichols, Inc. v. Architectual Stone Corp.*, above, a second time for this proposition as well. (O. Br. 88-89)

That federal rule of interpretation applies to "arbitration agreements" in a contract, not other provisions in a contract, and could not. Otherwise the same provision in the same contract could have different state and federal meanings at the same time. *See* pp. 12-15, above. (3) That federal rule of interpretation could not apply to this arbitration neutral choice-of-law provision in this contract. Otherwise the provision would have to mean state law when it is more favorable to arbitration and federal law when it is not. So the clause would have different meanings at the same time on that score as well. *See* pp. 12-15, above.

The "generously construed" rule has no application here.

CONCLUSION AS TO PART B

The interpretation of the agreement is a state law question and the Court of Appeal's interpretation of it was right.

C. SECTIONS 3 AND 4 OF THE FAA WOULD NOT APPLY IN THIS STATE COURT PROCEEDING, EVEN ABSENT THE PARTIES' AGREEMENT.

Volt asserts that: (1) The FAA "contains no counterpart provisions" to CCP § 1281.2(c). (2) An FAA rule instead compels arbitration of a claim notwithstanding "the existence of . . . non-arbitrable third-party claims" and the duplicative litigation and inconsistent judgments an order to compel may, by reason of those claims, cause. (3) Absent these parties' choice-of-law agreement, there is "no serious controversy" that that FAA rule would obtain in this state court proceeding. (O. Br. 59, 61, 62-66)

The Court need not reach those assertions because the parties' agreement is not absent, it is valid (Part IV A), and the Court of Appeal properly interpreted it (Part IV B; a state question anyway). Should the Court reach them, however, we grant that assertions 1 and 2 are true. But assertion 3 is not without "serious controversy," at the least.

Sections 1 and 2 of the FAA make valid and enforceable "written provisions" to arbitrate in "maritime" contracts and contracts "involving commerce." Those sections are the FAA's "substantive" provisions. *See Southland Corp.*, above, 465 U.S. at 16 n.10. Section 3 provides for stays of litigation while arbitration proceeds, and § 4 provides for orders compelling arbitration where one party refuses to arbitrate. Those sections are procedural, and they do not by their terms apply to proceedings in state court. To the contrary, § 3 applies by its terms to proceedings "brought in any of the courts of the United States" and § 4 to proceedings in "any United States district court."[29] Section 4 also refers, twice, to the "Federal Rules of Civil Procedure," and those Rules do not apply in state courts. Volt's assertion that the rule compelling arbitration-regardless-of-duplicative-litigation-and-inconsistent-judgment applies in state court assumes the premise that §§ 3 and 4 apply in state court. So does Volt's conclusion that, absent the parties' agreement, its "petition to compel" would have to have been granted by this state court (O. Br. 65); § 4, again, provides for the granting of petitions to compel.

---

[29] There is no difference between "courts of the United States" and "United States district court," as used in §§ 3 and 4. *See Southland Corp.*, above, 465 U.S. at 29 n.18 (O'Connor, J., dissenting)

This Court has never held that §§ 3 and 4 apply to proceedings in state court. and this case should not be the first. This is what the case law holds:

Prima Paint v. Flood & Conklin, above, 388 U.S. 395, is, again, the beginning.[30] It observed that § 3 requires a *"federal court,"* to stay litigation, and that § 4 "provides a *federal remedy.*" 388 U.S. at 400 (emphasis added). It held that "in passing upon a § 3 application" a *"federal court* may consider only issues relating to the making and performance of the agreement to arbitrate." 388 U.S. at 404 (emphasis added). It held further that the FAA was well within Congressional power to "prescribe how *federal courts* are to conduct themselves with respect to subject matter [interstate commerce and admiralty] areas over which Congress plainly has power to legislate." 388 U.S. at 405 (emphasis added).

Thus *Prima Paint* made clear that the FAA, and in particular §§ 3 and 4, dealt with federal court proceedings.[31] Sixteen years later, in 1983, *Moses H. Cone* held that the "effect of . . . [§ 2 of the FAA] is to create a body of federal *substantive* law of arbitrability." 460 U.S. at 24 (emphasis added). *Moses H. Cone* also said, in dictum, that that federal substantive law was applicable in "state or federal court." *Id. Moses H. Cone* laid down the rule, last, that a petition to compel arbitration should be granted notwithstanding the existence of non-arbitrable disputes between one party to the arbitration agreement and others; the "relevant federal law *requires* piecemeal

---

[30] *Bernhardt v. Polygraphic Co.*, above 350 U.S. 198, predates *Prima Paint*; it held that the FAA only applies to maritime contracts and contracts involving interstate commerce.

[31] The dissent pointed out that application of the FAA to state courts would "flout the intention of the framers of the Act." 388 U.S. at 424 (Black, J., dissenting).

resolution when necessary to give effect to an arbitration agreement," *Moses H. Cone* said. 460 U.S. at 20 (emphasis in original). *Moses H. Cone* arose in federal court, however, and it did not hold that that rule compelling arbitration-regardless-of-duplicative-litigation-and-inconsistent-judgments applied in state court.[32]

Thus the law appeared to be that the FAA's "federal substantive law" applied in federal and state court (*Moses H. Cone*); that the FAA in general and §§ 3 and 4 in particular applied in federal court (*Prima Paint*);[33] and that this Court had not held that the procedural provisions of the FAA, in particular §§ 3 and 4 and *Moses H. Cone's* piecemeal litigation rule, applied in state court. *Southland Corp.*, above, made clear that that was the law. *Southland Corp.* was the first state court case in the line to reach this Court. It affirmed *Moses H. Cone's* dictum that the "substantive law the . . . FAA created was applicable in state and federal court." 465 U.S. at 12. It also expressly did not "hold that §§ 3 and 4 of the . . . [FAA] apply to proceedings in state courts." 465 U.S. at 16 n.10. Rather, it indicated the opposite was so.

> "Section 4, for example, provides that the Federal Rules of Civil Procedure apply in proceedings to

---

[32] *Moses H. Cone* noted that "the state courts have almost unanimously recognized that the stay provision of § 3 applies to suits in state as well as federal courts, 460 U.S. at 26 n.34, but did not (and had no occasion to) decide that question. Since then, the Court expressly did not "hold that §§ 3 and 4 of the [FAA] . . . apply to proceedings in state courts." *Southland Corp.*, above, 465 U.S. at 16 n.10. *See* pp. 46-47, below.

[33] Subject to the *Bernhardt* maritime/interstate commerce limit.

> compel arbitration. The Federal Rules do not apply in some state court proceedings." (Ibid.)

That is where the case law stands.[34] There is no reason for this Court to change it, much less hold that §§ 3 and 4 apply to state court proceedings, let alone hold that *Moses H. Cone's* rule compelling arbitration-regardless-of-duplicative-litigation- and -inconsistent-judgments does. There are three very good reasons to hold they do not.

First, §§ 3 and 4 by their terms apply to federal, not state court, proceedings. *See* pp. 43-46, above; *Southland Corp.*, above, 465 U.S. at 16 n.10.[35]

Second, the legislative history shows that Congress meant what it said. Right after the FAA was signed into law, the American Bar Association Committee that drafted it and pressed to pass it, summed it up this way:

---

[34] Post *Southland Corp.*, *Mitsubishi*, above, 473 U.S. 614, 626, which arose out of the federal courts, recited *Southland Corp.'s* "federal substantive law" rule. Volt advises (O. Br. 64-5 n.) that *Perry v. Thomas*, above, 107 S. Ct. 2520, also post *Southland Corp.*, "mooted" the issue that *Southland Corp.* did not resolve, but *Perry* did not. *Perry* arose out of the state courts, but it did not mention, much less purport to resolve, the *Southland Corp.* issue. In fact, *Perry's* holding was based on § 2, the substantive provision of the Act, not §§ 3 or 4. 107 S.Ct. at 2525-26.

[35] Other procedural provisions of the FAA also apply to federal court proceedings by their terms. See 9 U.S.C. § 7 ("United States court in and for the district" may compel attendance of witnesses); 9 U.S.C. § 9 (confirmation of award by "United States court in and for the district"); 9 U.S.C. § 10 (vacation of award by "United States court in and for the district"); 9 U.S.C. § 11 (modification or correction of award by "United States court in and for the district.")

> "The statute establishes a procedure in the *Federal courts* for the enforcement of arbitration agreements . . . A Federal statute providing for the enforcement of arbitration agreements *does relate solely to procedure of the Federal courts. . . .*" *Quoted in Southland Corp.*, above, 465 U.S. at 26 (O'Connor, J., dissenting).

The full history is set forth in Justice O'Connor's dissent in *Southland Corp.* We do not mean to reargue the issue *Southland Corp.* decided: we agree that the FAA's substantive law applies in state courts. But the legislative history makes clear at the least that the FAA's procedural rules were meant to apply in federal court only, and not "by any flight of fancy to permit Congress to control proceedings in state courts." *See* 465 U.S. at 28 (O'Connor, J., dissenting).[36]

Third, the procedural business of state courts is ordinarily the business of state courts, and imposing federal procedural rules on them is, in general, at odds with our federal system. "The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." *Hart*, 54 Colum. L. Rev. at 508; *Southland Corp.*, above, 465 U.S. at 32-33. (O'Connor, J., dissenting.) *See also Sun Oil Co. v. Wortman*, 56 U.S.L.W. 4601, 4603 (June 15, 1988) (forum state's application of its statute of limitation to claim arising in other state does not violate Full Faith and Credit Clause):

> "Since the procedural rules of its courts are surely matters on which a State is competent to legislate, it

---

[36] That phrase was directed to Congress' power to legislate under Article III, but, we submit, it also applies here.

> follows that a State may apply its own procedural rules to actions litigated in its courts."[37]

No doubt the FAA makes arbitration agreements subject to it enforceable. We grant therefore that a state court cannot refuse to make available the procedural remedies that obtain in state court to enforce them. But it does not follow that a state court must issue an order to compel to enforce them when state law does not provide for orders to compel, but provides, for example, for injunctive relief. Nor does it follow that where, as here, state law does provide for an order to compel (CCP § 1281.2), a state

---

[37] The issue is not whether rules are "substantive" or "procedural," or outcome determinative, under *Erie R. Co. v. Tompkins*, above, 304 U.S. 64 and *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). The issue is whether Congress intended FAA rules generally taken to be procedural to apply in state court proceedings. It did not. (*See* text.) FAA §§ 3 and 4 provide remedies, and remedies are generally taken to be procedural. See, e.g., *Sun Oil Co. v. Wortman*, above, 56 U.S.L.W. at 4604 ("remedies available" are "generally treated as procedural under conflicts law. . . .")

Notwithstanding that "matters respecting the remedy" are generally considered procedural, federal "procedural" rules may apply in state court where necessary to effect Congress' purpose. *See Central Vermont Ry. v. White*, 238 U.S. 507, 511-12 (1915) (burden of proof in FELA case); *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359 (1952) (state court cannot take factual question of fraud from jury in FELA case; "right to trial by jury is too substantial a part of the rights accorded by the Act" to permit State procedural rule to take it away). See generally *Hart & Wechsler*, The Federal Courts and The Federal System, 566-573 (2d ed. 1973). Applying FAA §§ 3 and 4 and the rule compelling arbitration-regardless-of-duplicative-litigation-and-inconsistent-judgments to these state court proceedings is not necessary to effect Congress' purpose. Rather, it would be contrary to the express terms of §§ 3 and 4 and to Congress' expressed intent to legislate in respect to federal court procedures only.

court must issue that order notwithstanding that state procedural law militates against it.

It would be particularly untoward if the FAA's procedural rules were held to forbid application of this state procedural law in this state court. This law's purpose is to avoid duplicative, piecemeal litigation and inconsistent judgments. Surely the FAA was not intended to force a state court to issue orders compelling piecemeal litigation and effecting inconsistent judgments in violation of state law. Why would Congress want to do that in 1925 or ever? *See Sun Oil v. Wortman*, above, 56 U.S.L.W. at 4605 (recognizing a "State's interests in regulating the workload of its court").

CONCLUSION AS TO PART C

The FAA would not foreclose application of CCP § 1281.2(c) in state court proceedings even absent the parties' agreement. But the agreement is not absent, and the Court need not reach the question.

V. CONCLUSION

This appeal should be dismissed or the judgment below affirmed, summarily or on full consideration.

Dated: July 15, 1988.

Respectfully submitted,

McCutchen, Doyle, Brown
& Enersen
David M. Heilbron
(Counsel of Record)
Leslie G. Landau
Stephen L. Godchaux

Counsel for Appellee
The Board of Trustees of the
Leland Stanford Junior University